

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARTELLE LAMONT WILLHITE,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 261509

Kalamazoo Circuit Court

LC No. 04-002105-FH

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for operating a vehicle under the influence of intoxicating liquor, third offense, MCL 257.6256(D), and driving while license suspended, MCL 257.9041(B). Because we find no error in denying defendant's request to excuse a juror for cause and further find no prosecutorial misconduct, we affirm.

On October 24, 2004, Allegan County police received a call concerning a light blue vehicle that was driving on northbound US 131 in an erratic manner, at one point crashing into a barrier ramp on the shoulder of the highway. Officers pulled the vehicle over based upon the caller's information and because the vehicle had changed lanes without signaling. When officers approached the vehicle, Noah Mickaels was in the driver's seat of the vehicle and defendant was in the front passenger seat. Mickaels was given a preliminary breath test (registering .05) and several field sobriety tests, which he demonstrated an ability to perform. Mickaels thereafter told the officers that defendant was the person driving the vehicle earlier in a reckless manner. Defendant was arrested after failing six field sobriety tests and measuring a blood alcohol level of .28 on a breathalyzer.

Defendant first asserts that he was denied his constitutional right to an impartial jury and a fair trial, when the trial court denied his challenge for cause of a juror, who once belonged to Mothers Against Drunk Driving (MADD). We disagree. This Court reviews a trial court's rulings on challenges for cause based on bias for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000).

A defendant who chooses to be tried by a jury has a right to a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). An impartial jury is "one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with

the commission of the crime charged.” *People v Kamischke*, 3 Mich App 236, 240-241; 142 NW2d 21 (1966)(citation omitted).

Jurors are presumptively competent and impartial and a party alleging a disqualification bears the burden of proof. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. *People v Lee (After Remand)*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

MCR 2.511(D) provides in pertinent part:

(D) Challenges for Cause. The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

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(2) is biased for or against a party or attorney;

(3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

(4) has opinions or conscientious scruples that would improperly influence the person’s verdict.

MCL 768.10, however, prohibits excluding a person for cause on the basis of past opinions and impressions:

The previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: Provided, That the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial: Provided further, That the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.

A juror who “expresses an opinion referring to some circumstances of the case which is not positive in character, but swears he can render an impartial verdict, may not be challenged for cause.” *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

On review of the record, we are convinced that the trial court correctly denied defendant’s motion to remove the juror for cause. Defendant wanted the juror disqualified because at one time, many years earlier, the juror was a member MADD and expressed having felt strongly about the issues and the work that was being done by MADD. Yet, the juror had not been a member of the organization for over 10 years. More importantly, the juror repeatedly assured the trial court she would decide the case on its facts and would have no problem staying impartial. In Michigan, the general rule holds that if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, the juror can remain on the panel. *People v Jendrzewski*, 455 Mich 495, 515; 566 NW2d 530 (1997). Here, the juror stated under oath that she could set aside her past impressions and decide this case on its facts. We therefore find no abuse of discretion in the trial court’s opinion and conclude that defendant was not denied his constitutional right to be tried by a fair and impartial jury.

Defendant next argues that the prosecutor committed prosecutorial misconduct in violation of defendant’s constitutional due process rights. Specifically, defendant asserts that the prosecutor vouched for the credibility of a prosecution witness and misstated the law. Because there was no objection made at trial to the prosecution’s statements, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This requires a showing of prejudice, which can be established by demonstrating that a clear error affected the outcome of the trial court proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003).

This Court evaluates a prosecutor’s comments in context to determine if the defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Each claim is decided on a case-by-case basis, and the alleged misconduct is considered in light of all of the facts of the case, defendant’s arguments, and the evidence presented at trial, and in the context of all the remarks the prosecutor made. *Id.*; *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Even if improper, remarks may not require reversal if they are raised in reply to issues introduced by the defense. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant contends that the prosecutor improperly vouched for the credibility of Noah Mickaels and used the prestige of the prosecutor’s office to wield undue influence. However, at trial, defense counsel argued that Mickaels had motive to lie and, in fact, had actually lied twice under oath. It was only in rebuttal to this argument that the prosecutor pointed to facts from the case and argued that Mickaels was not lying and had no motive to do so. The prosecutor’s arguments, then, were based on the evidence presented at trial and addressed defense counsel’s closing argument. Responsive comments generally do not constitute error requiring reversal. *Duncan, supra*. Moreover, a prosecutor may argue that a defendant’s argument is unworthy of belief, as long as the argument is based on the evidence rather than on matters not of record or the prestige of the prosecutor’s office. *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983).

Further, defendant did not object to the misconduct and, therefore, “appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, a prompt, curative instruction could have removed any taint the prosecutor's brief comments may have caused. Moreover, the trial court specifically instructed the jurors that it was their duty to determine the credibility of witnesses and that the lawyers' statements and arguments should not be considered evidence. We find no error requiring reversal in the challenged remarks regarding Mickaels' veracity.

Finally, we find that defendant abandoned his additional argument regarding an alleged misstatement of law by the prosecutor during rebuttal. The argument was undeveloped, and, in fact, appears only in a short footnote in defendant's brief. A party may not announce a position and leave it to this Court to discover and rationalize his position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). As a result, this Court need not address defendant's allegation of error premised upon a misstatement of law.

Affirmed.

/s/ David H. Sawyer  
/s/ Kurtis T. Wilder  
/s/ Deborah A. Servitto